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SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1932.

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# No. 138

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JOSEPH F. MILLER, PETITIONER,

*vs.*

A. C. ADERHOLD, WARDEN, UNITED STATES PENITENTIARY, ATLANTA, GEORGIA, RESPONDENT.

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**PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT AND BRIEF IN SUPPORT THEREOF.**

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JOSEPH F. MILLER,
*Petitioner, Pro se.*

Post Office Box 1733, Atlanta, Georgia.

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JOSEPH F. MILLER, PETITIONER,

*vs.*

A. C. ADERHOLD, WARDEN, UNITED STATES PENITENTIARY, ATLANTA, GEORGIA, RESPONDENT.

## PETITION FOR WRIT OF CERTIORARI

*To the Honorable Chief Justice and the Associate Justices of the Supreme Court of the United States:*

Joseph F. Miller, petitioner herein, prays that a writ of certiorari issue to review the judgment of the Circuit Court of Appeals for the Fifth Circuit in the above entitled cause entered February 20, 1932 (56 Fed. (2) 152), and rehearing denied March 11th, 1932 (not yet reported).

### Jurisdiction.

The judgment of the United States Circuit Court of Appeals was entered February 20th, 1932 (R. 8). A

petition for rehearing was denied March 11th, 1932 (R. 10-19, not yet reported).

This petition for certiorari is filed with this Honorable Court within the time provided by statute and petitioner invokes the jurisdiction of this Court under the provisions of the Act of February 13th, 1925.

## Questions Presented.

This petition for certiorari presents but two questions:

Has a United States District Judge power, authority, and jurisdiction to indefinitely and unconditionally to suspend the imposition of sentence upon conviction of a defendant for violation of a law involving crime?

Does the United States District Court after the suspension of said sentence and after said term of Court had expired retain jurisdiction to recall the convicted person and to impose a definite sentence?

## The Statute Involved.

The pertinent provisions of the Probation Act, Section 724 U. S. C. A. Title 18, reads in whole as follows:

> "The courts of the United States having original jurisdiction of criminal actions, except in the District of Columbia, when it shall appear to the satisfaction of the court that the ends of justice and the best interest of the public, as well as the defendant, will be subserved thereby, shall have power, after conviction or after a plea of guilty or *nolo contendere* for any crime or offense not punishable by death or life imprisonment, to suspend the imposi-

tion or execution of sentence and to place the defendant upon probation for such period and upon such terms and conditions as they may deem best: or the court may impose a fine and may also place the defendant upon probation in the manner aforesaid. The court may revoke or modify any condition of probation, or may change the period of probation. The period of probation together with any extension thereof, shall not exceed five years."

## STATEMENT

The case originated in the District Court of the United States for the Southern District of New York. The petitioner, Joseph F. Miller, was indicted for larceny from the mails under Title 18, Section 317, U. S. C. A. He entered a plea of guilty for the offense charged therein on December 10th, 1930, and the Court made an order suspending the sentence, and ordered the discharge of the petitioner from the custody of the United States Marshal (R. 2-4).

On June 17th, 1931, petitioner was again brought into court and was sentenced by a different Judge to be imprisoned at and in the United States Penitentiary at Atlanta, Georgia, for a term and period of four years from and including the 17th day of June, 1931.

The petitioner thereafter was committed to the United States Penitentiary at Atlanta, Georgia, and on December 12th, 1931, filed a petition in *forma pauperis* for a writ of *habeas corpus* in the United States District Court for the Northern District of Georgia, Atlanta Division thereof. Such writ of *habeas corpus*

was dismissed and petitioner remanded to the custody of the Warden (R. 4).

That within the time provided for appeals petitioner filed his notice of appeal (R. 5) which appeal was duly allowed by the Court (R. 5). And thereafter and on February 20th, 1932, the United States Circuit Court of Appeals, Fifth Circuit, filed an opinion (R. 7) affirming the judgment and order of the lower court. And thereafter, and on the 9th day of March, 1932, petitioner filed with the United States Circuit Court of Appeals, Fifth Circuit, a petition for rehearing or motion to certify questions to this Court; and thereafter, on March 11th, 1932, the United States Circuit Court of Appeals made an order denying rehearing (R. 10).

**Reasons for the Allowance of Writ.**

There is a distinct conflict between the opinion of the United States Circuit Court of Appeals for the Fifth Circuit rendered herein and of the opinions rendered in the cases of *Mintie* v. *Biddle*, 15 Fed. (2) 933; *United States* v. *Maisel*, 26 Fed. (2) 275; *Riggs* v. *United States*, 14 Fed. (2) 9; *United States* v. *Wilson*, 46 Fed. 748; *United States* v. *Murray*, 275 U. S. 353; *Ex parte United States*, 242 U. S. 27, and the case of *United States, ex Rel. Campbell* v. *Bishop*, 47 Fed. (2) 95.

For the foregoing two reasons, particularly the first, this petition should be granted. Upon this Honorable Court's interpretation of the probation act depend the liberty of hundreds in the future.

The fundamental rights of petitioner and others have been affected by grave errors of law involving the imposition of sentence after sentence has been definitely suspended.

WHEREFORE, the premises considered, your petitioner respectfully prays that a writ of certiorari be issued out of and under the seal of this Honorable Court, directed to the United States Circuit Court of Appeals for the Fifth Circuit, commanding that Court to certify and send to this Court for its review and determination, on a day certain to be therein named, a full and complete transcript of the record and all proceedings in the case of *Joseph F. Miller* v. *A. C. Aderhold,* Warden, United States Penitentiary, Atlanta, Georgia, numbered 6470, and that the said judgment of the United States Circuit Court of Appeals for the Fifth Circuit may be reversed, and petitioner be ordered released from further confinement at the United States Penitentiary at Atlanta, Georgia; and for such other relief as to the Court may seem meet and proper in the premises.

JOSEPH F. MILLER, *Pro se.*

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## ARGUMENT.

The petition raises two questions as to which the decision below is in conflict with the ruling of this Court in the case of *United States* v. *Murray*, 275 U. S. 353; and *Ex parte United States*, 242 U. S. 27, and in conflict with the ruling made by the United States Circuit Court of Appeals in *Mintie* v. *Biddle* (8 C. C. A.), 15 Fed. (2) 933.

In the affirmance of the judgment of the court below the United States Circuit Court of Appeals, Fifth Circuit, relies on the case of *Ex parte United States*, 242 U. S. 27, and the case of *United States ex rel. Campbell* v. *Bishop, Morale Officer*, 47 Fed. (2) 95, 96, 97. The Honorable United States Circuit Court of Appeals, Fifth Circuit, has overlooked the fact that the case of *Ex parte United States*, 242 U. S. 27, was decided by this Honorable Court in 1916.

That since that opinion Section 724, Title 18, U. S. C. A., was enacted by Congress on March 4th, 1925, which awarded the United States District Courts the power which they previously did not have "TO SUSPEND THE IMPOSITION OR EXECUTION OF SENTENCE".

The case of *Campbell* v. *Bishop, Morale Officer*, 47 Fed. (2) 95, is not in point. In that case a definite sentence was imposed but execution was suspended, and upon violation of the terms of parole or probation, suspension of execution was suspended.

In the case of petitioner the United States District Court for the Southern District of New York suspended the sentence indefinitely and did not place

petitioner on probation. He pleaded guilty for stealing from the mails (Title 18, Sec. 317, U. S. C. A.). On December 10th, 1930, the following entry was made on the docket of the Court:

> "December 10th, 1930, pleads guilty. Sentence Suspd. Coleman, J." (R. 2.)

Petitioner was accordingly discharged from the custody of the United States Marshal (R. 2).

That thereafter, on June 17th, 1931, after several terms of the Court had passed, petitioner was brought before the Court, and without a hearing and without the advice of counsel, was re-sentenced by another judge. The record shows that on such date the following docket entry was made:

> "June 17, 1931. P. G. Sentenced to four years U. S. Penitentiary, Atlanta, Georgia. Goddard, J." (R. 3.)

Section 178, Title 28, U. S. C. A., provides:

> "Terms of the District Court for the Southern District of New York shall be held at New York City on the first Tuesday in each month."

Therefore it will be seen that six terms expired between the indefinite suspension of sentence by Judge Coleman on the tenth day of December, 1930, and the imposition of sentence of four years' imprisonment in the penitentiary by Judge Goddard on June 17th, 1931.

The proposition is whether, after one judge indefinitely and unconditionally suspends sentence, another

judge of the same court has power, six months, or six terms later, and without a proper hearing, to revoke the suspension and sentence an accused to confinement in a United States penitentiary. Under the provisions of the probation statute, Section 724, Title 18, U. S. C. A., it is the duty of the court to fix definitely the period of probation; not, however, to exceed five years. Unless a defendant is informed as to the period of time during which he is to remain on probation, the probation might actually work greater hardship than a definite term in the penitentiary, as was illustrated in the case of *Mintie* v. *Biddle* (8 C. C. A.) 933. That court said:

> "Obviously, the matter of the furtherance of the administration of justice is not a unilateral one. The accused is due some modicum of consideration. It is not alone the ends and accommodation of the government which are to be considered and subserved; but those of the defendant as well. Held thus in suspension indefinitely and for a period which turned out to be thirty-four months, defendant could, in the interim, make no plans, enter into no contracts, engage in no permanent occupation, and bind himself to no obligations, or create any permanent ties, business or domestic."

The petitioner is entitled to be informed as to the period of probation for the further reason that if he conducted himself as a law abiding citizen, he has the right, at the end of the fixed period, to have further proceedings against him dismissed.

See *United States* v. *Maisel,* 26 Fed. (2) 275.

Unless the period of probation is fixed, therefore, the defendant is robbed of the incentive to conduct himself properly, with the hope that further proceedings will be dismissed at the end of the probation period.

See *Riggs* v. *United States,* 14 Fed. (2) 9.

The probation Act avers that the court shall "place the defendant upon probation *for such period and upon such terms and conditions* as it may deem best." And specifically by Section 727, Title 18, U. S. C. A., it is provided:

> "The probation officer shall furnish to each person released on probation under his supervision a *written statement of the conditions of probation* and shall instruct him regarding the same."

This Honorable Court in the case of *United States* v. *Murray,* 275 U. S. at page 353, said:

> "Its subsequent sections provide for appointment of one or more suitable persons to serve as probation officers and for their compensation and expense, and *make it the duty* of the probation officer to furnish to the person released a written statement of the *conditions of probation.*"

The petitioner herein was certainly entitled to be advised as to the course of conduct he is to pursue during the period of probation. A fair reading of the probation Act discloses the intention of Congress that the probation can only be revoked by the court when the defendant has broken the conditions upon which he

was placed on probation. In the case at bar, Judge Coleman, on December 10th, 1930, indefinitely and unconditionally suspended the sentence. He did not designate any condition nor did his honor attempt to fix a specific period during which the sentence would remain suspended, as contemplated and required by the probation Act.

As aforesaid, Honorable Judge Henry W. Goddard, on June 17th, 1931, six months after the original suspension of sentence and release of petitioner from custody, imposed a sentence of four years imprisonment, without any proof of petitioner's bad conduct and without awarding petitioner an opportunity to prove his good conduct and behavior as a law abiding citizen in the community in which he resided.

Could the court six terms after the unconditional and indefinite suspension of the sentence on December 10th, 1930, revoke the sentence and impose a definite sentence?

In this case the court indefinitely and unconditionally suspended the sentence and could not six terms thereafter revoke such order and proceed to judgment by sentencing petitioner to confinement at and in the United States Penitentiary at Atlanta, Georgia.

Wherefore it is respectfully submitted that this Honorable Court award certiorari and your petitioner be ordered released from his present unlawful confinement.

Respectfully submitted.

JOSEPH F. MILLER,
*Pro Se.*